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BEFORE THE  
**Federal Communications Commission** MAY 12 1999  
WASHINGTON, D. C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
)  
1998 Biennial Regulatory Review-- ) MM Docket No. 98-43  
Streamlining of Mass Media )  
Applications, Rules, and Processes )  
)  
)  
Policies and Rules Regarding ) MM Docket No. 94-149  
Minority and Female Ownership of )  
Mass Media Facilities )  
\_\_\_\_\_)  
)  
In re )  
)  
)  
W. RUSSELL WITHERS, JR. )  
KZXA(FM), Santa Fe, New Mexico )  
KEFE(FM), Los Alamos, New Mexico )  
  
TO: The Commission

**NOTICE: EXPEDITED ACTION REQUESTED**

**MOTION FOR STAY, OR  
IN THE ALTERNATIVE  
FOR WAIVER OR "TOLLING"**

W. Russell Withers, Jr. (Withers), permittee of FM Broadcast Stations KZXA, Santa Fe, New Mexico, and KEFE, Los Alamos, New Mexico, by his attorney, and pursuant to Section 1.429 of the Commission's Rules, hereby respectfully seeks the imposition of an administrative stay on Section 73.3598(e) of the Commission's Rules. That is, Withers

respectfully requests that the Commission stay the expiration of all existing construction permits for new broadcast stations, including the construction permits for FM Broadcast Stations KZXA, Santa Fe, New Mexico (File No. BMPH-990126JE) and KEFE, Los Alamos, New Mexico (File No. BMPH-990126JD), until sixty days after publication in the Federal Register of the Commission's "Report and Order" dealing with all petitions for reconsideration in the above-captioned rulemaking proceeding. In the alternative, Withers seeks either a waiver of the provisions of new Section 73.3598 of the Commission's rules, or "tolling" of the expiration dates for the KZXA and KEFE permits, under the unique facts relating to the KZXA and KEFE permits, to enable Withers to have beyond August 4, 1999 to complete construction, commence program test operations and file FCC Form 302-FM applications for both stations. In support whereof, the following is shown:

**Request for Stay**

1. Withers timely filed on January 19, 1999 a "Petition for Reconsideration" in the above-captioned matter. It is believed that there are at least 28 other similar petitions filed at the Commission by other parties. There is a substantial likelihood that the Commission will

not conclude proceedings in the above-captioned docket until well after August 12, 1999, by which date it is believed that most construction permits which were originally granted over three years ago will have (under the new rules) irrevocably have expired. Simply decency and administrative fairness on the part of the Commission requires that the Commission preserve the **status quo ante** until it has had a complete opportunity to review all petitions for reconsideration and reach a ruling which is fair to all.

2. The applicable test for granting a stay is contained in **Virginia Petroleum Jobbers Assn. V. Federal Power Commission**, 259 F.2d 921, 925 (D. C. Cir. 1958) and **Station KDEW(AM), DeWitt, Arkansas**, 11 FCC Rcd 13683 (1996), to wit: (1) likelihood that the movant will prevail on the merits; (2) likelihood of irreparable harm to movant; (3) prospect that others will be harmed if the court or agency grants the stay; (4) the public interest inherent in the stay.

3. **Likelihood of Success on the Merits.** Supreme Court Justice Antonin Scalia gives the best statement of the law in his concurring opinion in **Bowen v. Georgetown Univ. Hospital**, 488 U.S. 204, 220, 102 L. Ed. 2d 492, 507 (1988):

A rule that has unreasonable secondary retroactivity—for example, altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule—may for that reason be “arbitrary” or “capricious”, see 5 USC §706, and thus invalid.

See also *United States v. Winstar Corporation*, 518 U.S. 839, 135 L. Ed. 2d 964, 1008-1010, where the Supreme Court told Congress that it was unlawful to change its rules in “the middle of the game”.

4. The ruling statute in this area is Section 319(b) of the Communications Act of 1934, as amended, 47 U.S.C. §319(b), which states:

(b) Such permit for construction shall show specifically the earliest and latest dates between which the actual operation of such station is expected to begin, and shall provide that said permit will be automatically forfeited if the station is not ready for operation within the time specified or within such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.

Congress did not give the Commission specific authority to “sunset” a construction permit at a date certain, regardless of “causes not under the control of the grantee”. The new rule takes into account *some* causes, such as tornadoes or court proceedings; however, it does not take into consideration all causes not under the control of the grantee. As such, the amendment of Sections 73.3534 and 73.3598 to preclude FCC Form 307 applications and showings

under former Section 73.3534 is *ultra vires*, and therefore illegal. See e.g. *MCI v. FCC*, 512 U.S. 218 (1994).

5. Therefore, there is a substantial likelihood of the position of Withers and his fellow petitioners prevailing on the merits, and the stay is justified on this ground.

6. **Irreparable Harm.** Obviously, if Withers is prevented from constructing KZXA and KEFE by causes beyond his control and having FCC Form 302-FM applications on file by August 4, 1999, and he cannot extend the life of the two construction permits, he is irreparably harmed. Obviously, he has lost a substantial prior investment--\$131,000.00 in acquisition costs for the two construction permits, plus legal and engineering fees, costs involved in negotiating with Indian tribes for use of land on their reservations to construct a tower. Further, he would lose the opportunity to earn profits from advertising revenues on the stations. Withers and most of his fellow petitioners will suffer substantial irreparable harm in the event that some relief is not granted to them.

7. **No Harm to Others.** It is inconceivable that others could be harmed by a grant of the requested stay. Indeed, it is a well-settled principle in communications law

that no party has a vested interest in the disqualification of an applicant for a broadcast construction permit. *Crosthwait v. FCC*, 584 F.2d 550 (D. C. Cir. 1978). The logical application of this principle is that no one has a vested interest in the expiration or revocation of a construction permit.

8. **The Public Interest Lies With a Stay.** Withers purpose in pursuing the construction of KZXA and KEFE is to provide new local FM Broadcast service to Santa Fe, Los Alamos and the substantial rural regions of northern New Mexico. A number of the stations licensed to Santa Fe focus their attention on audiences and advertisers in Albuquerque and central New Mexico. Withers is attempting to construct KZXA and KEFE to serve northern New Mexico. That this is so can be seen merely by the location of the joint transmitter site for KZXA and KEFE, roughly 30 highway miles north of Santa Fe on the San Juan Pueblo. Withers is close to concluding negotiations with the San Juan Pueblo reservation which will allow him to construct KZXA and KEFE. It is hoped that this construction will be concluded and the stations on the air by the end of 1999. It is because Withers is unsure whether construction can be completed by August 4, 1999 that he is seeking this stay. Withers is one

of many petitioners who were caught by surprise at the harshness of the new FCC regulations concerning construction permits. Both Withers and the public in northern New Mexico stand to lose a great deal if this stay is not granted.

**Request for Waiver or "Tolling"**

9. As the Commission's records for KZXA and KEFE will show, Withers has been the permittee of KZXA only since August 1, 1996, and the permittee of KEFE only since August 8, 1997. Pursuant to Section 73.207 of the Commission's Rules, the transmitter sites for KZXA and KEFE are restricted to areas basically contained in Rio Arriba County, New Mexico, to the north of Santa Fe and to the east of Los Alamos. Withers has engaged in substantial and time-consuming negotiations with the San Juan Pueblo, an Indian tribe whose reservation is located north of Espanola, the county seat of Rio Arriba County. It became necessary to negotiate with this Indian tribe for use of land on their reservation when the Rio Arriba County government ruled in the case of KYBR(FM), Espanola, New Mexico, that it would not waive or otherwise grant a variance to a county zoning ordinance which restricts tower height to 70 feet above the ground or less. Tribal lands such as the San Juan Pueblo are "sovereign", and as such not subject to county zoning

regulations. Withers is nearing the conclusion of these negotiations, and is awaiting counter-signature by the San Juan Pueblo and by the Bureau of Indian Affairs on a lease that will enable him to commence construction immediately. However, the August 4, 1999 deadline is less than three months away.

10. Obviously, Withers is in the best position to provide new broadcast service over two channels to northern New Mexico, and his track record over almost three decades of broadcast ownership and management can assure the Commission and the public that these stations will be built. However, Withers needs some additional time, to ensure that he can meet an absolute FCC deadline without an unfair risk of losing a further six figure investment that he will have to make to construct the stations. Should Withers' construction permits be revoked or considered irretrievably expired, the deserving public in northern New Mexico may have to wait several years before service over 94.7 MHz and 107.5 MHz is commenced.

11. In view of the fact that FCC spacing regulations require KZXA and KEFE to be constructed in Rio Arriba County, in view of Rio Arriba County's unconscionably restrictive zoning ordinance relative to towers, and in view



of the substantial negotiations with the San Juan Pueblo that have taken place to date, Withers seeks a ruling pursuant to 47 U.S.C. §319(b) that his ability to construct KZXA and KEFE to date have been prevented by causes not under his control, and that alternatively, either Section 73.3598 be waived to provide him with the three-year construction period provided since February 16, 1999 to new permittees (thereby allowing him until February 16, 2002 to complete construction and file FCC Form 302-FM applications), or that the "construction period" be tolled, that that Withers' be granted a three-year construction period which commences upon the latest date of the countersignatures on his lease by the San Juan Pueblo and the Bureau of Indian Affairs.

**Conclusion**

**WHEREFORE,** W. Russell Withers, Jr. urges that, alternatively (1) a stay be granted as requested herein, (2) that Section 73.3598 be waived in the cases of FM Broadcast Stations KZXA, Santa Fe, New Mexico and KEFE, Los Alamos, New Mexico, or (3) that the "construction periods" for KZXA and KEFE be tolled, and that the three year periods for construction commence on the date that the last

countersignature on a lease with the San Juan Pueblo is obtained.

Respectfully submitted,

W. RUSSELL WITHERS, JR.

By

A handwritten signature in black ink, appearing to read "D. Kelly", written over a horizontal line.

Dennis J. Kelly  
(D. C. Bar #292631)  
His Attorney

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May 12, 1999

**CERTIFICATE OF SERVICE**

It is hereby certified that true copies of the foregoing "Petition for Stay, etc." were served by first-class United States mail, postage prepaid, on the 12<sup>th</sup> day of May, 1999, upon the following:

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